***** Electronically Filed *****

119525

07/15/2015

Supreme Court Clerk

No. 119525

IN THE
SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee/Movant, v. LESLIE GEISSLER MUNGER, in her capacity as Comptroller for the State of Illinois, Defendant-Appellant/Respondent, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES; AFSCME COUNCIL 31, *et al.*, Intervenors-Appellants/Respondents.	Motion for Direct Appeal Pursuant to Supreme Court Rule 302(b). On interlocutory appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 15 CH 10243, to the Appellate Court of Illinois, First Judicial District, No. 1-15-1877. The Honorable DIANE J. LARSEN, Judge Presiding.
THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 31, *et al.*, Plaintiffs-Appellees/Respondents, v. STATE OF ILLINOIS, Defendant-Appellant/Movant, and LESLIE GEISSLER MUNGER, in her official capacity as Comptroller for the State of Illinois, Defendant-Appellant.	On interlocutory appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 15 CH 475, to the Appellate Court of Illinois, Fifth Judicial District, No. 5-15-0277. The Honorable ROBERT P. LeCHIEN, Judge Presiding.

SUPPLEMENTAL SUPPORTING RECORD

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Index to Supplemental Supporting Record

Date	Exhibit	Document
July 9, 2015	A	Appeal No. 1-15-1877 – Appellants' Brief
July 13, 2015	B	Appeal No. 1-15-1877 – Appellee's Brief
July 13, 2015	C	Appeal No. 5-15-0277 – Appellants' Brief

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

AFFIDAVIT

BRETT E. LEGNER, being first duly sworn upon oath, states as follows:

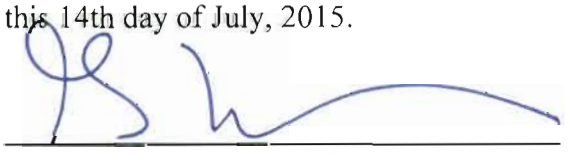
1. I am the Deputy Solicitor General in the Office of the Illinois Attorney General.

2. I am familiar with the record in First District Appeal No. 1-15-1877, and Fifth District Appeal No. 5-15-0277, which are the subject of the Rule 302(b) Motion in Matter No. 119525 pending in this Court.

3. The documents included in this Supplemental Supporting Record are true and accurate copies of documents filed with the appellate court in those appeals.

BRETT E. LEGNER

SUBSCRIBED and SWORN to before me
this 14th day of July, 2015.



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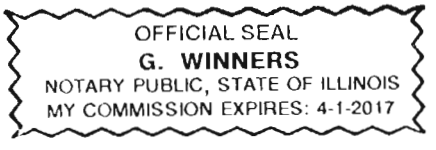

Exhibit A

NO. 15-1877

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

LESLIE GEISSLER MUNGER, in her capacity as Comptroller of the State of Illinois, Defendant-Appellant,

and

ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; ILLINOIS FEDERATION OF PUBLIC EMPLOYEES, LOCAL 4408, IFT-AFT-; LOCAL 919, IFT-AFT; LOCAL 4407, IFT-AFT; AND LOCAL 4051, IFT-AFT; ILLINOIS TROOPERS LODGE NO. 41, FRATERNAL ORDER OF POLICE; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 73; CONSERVATION POLICE LODGE OF THE POLICE BENEVOLENT AND PROTECTIVE ASSOCIATION,

Defendants-Intervenors-Appellants.

Appeal from the Circuit Court of Cook County, Illinois

Case No. 2015-CH-10243

Judge Diane J. Larsen, presiding

MEMORANDUM OF COMPTROLLER MUNGER AND ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW

The circuit court erred in granting the Attorney General's request for a temporary restraining order enjoining the Comptroller from processing vouchers for the payment of state employee payroll except for vouchers that do not exceed the minimum wage and overtime requirements of the federal Fair Labor Standards Act. The result of this order is that ***no*** workers will be timely paid for ***work already performed*** and the state will be subject to penalties under the FLSA, because – as all parties concede – compliance with the FLSA in the way ordered below is currently impossible.

Therefore, the order below compels the state to violate federal law and force state workers to go without pay for work already performed. No court, much less one sitting in equity, should force an employer to violate federal law, especially a state government employer, where it will be the taxpayers who must incur the penalties and fines imposed for these compelled violations. The circuit court's order is also prohibited by the Supremacy Clause of the United States Constitution, well-established pre-emption principles, and basic fairness to employees. Our request is simple: allow the state to continue complying with the FLSA in the only way currently possible – by processing payroll vouchers in full.

The ruling is especially troublesome in view of the following, which are undisputed:

- The Attorney General's own verified complaint and an accompanying exhibit establish that the State's electronic payroll systems are not set up to limit payroll only to the FLSA minimum; it will take 9-12 months to set up the system, but the first payroll deadline of the current fiscal year is today, July 9, 2015;
- The Comptroller submitted evidence, again undisputed, confirming the impossibility of processing payroll in the manner required by the circuit court's order;
- The state must comply with the FLSA, for the FLSA trumps state law.

All of this stacks up against the circuit court's ruling. And no evidentiary or legal stack appears in the record to support the opposite result.

The Attorney General presented the court with only two options: comply only with the FLSA minimums or do not comply at all. Of course, there is a third, legally permissible option. All agree that the FLSA preempts state law, and therefore, the circuit court should have confirmed the Comptroller's ability to process payroll vouchers in full. That, after all, is how the State complies with the FLSA in the ordinary course of events—by paying employees more than the federal minimum wage and paying earned overtime. By confirming that the Comptroller could continue processing payroll vouchers in full, the circuit court would have ensured compliance with the FLSA, avoided the multitude of intractable problems that it insisted the State grapple with by doing the impossible, and entered a highly equitable result of paying employees the full agreed rate for the work that the employees have already performed. That would have been legal, equitable, fair, and just.

Accordingly, we respectfully request that the Court reverse the grant of the injunction, pursuant to the Court's powers under Supreme Court Rule 366(a)(5), and enter an order confirming that the Comptroller shall continue complying with the FLSA in the only way possible—by processing payroll vouchers in full.

FACTS

Under state law, the Comptroller has the duty of maintaining the State's central fiscal accounts and ordering payments out of the funds held by the Treasurer. (SR.V1.C2-3) The fiscal year ended on June 30, 2015 without an enacted appropriation statute for the current fiscal year. (SR.V1C3) On Thursday, July 2, the Attorney General sued the Comptroller for a declaration as to what payments were proper during the budget impasse (SR.V1.C2-11), and simultaneously presented a motion for a temporary restraining order and preliminary injunction that would give effect to the Attorney General's view of which payments should and should not be made

(SR.V1C16-32). Most notably, the Attorney General sought an order forbidding the Comptroller from paying state employees a penny more than the minimum required under the FLSA. (SR.V1.C28, 30) The Comptroller was unrepresented, so the court set the matter for a "status" on Tuesday, July 7. (SR.V1.C49) CMS and several unions representing state employees were permitted to intervene. (SR.V1.C49)

The morning of the status, the Comptroller filed a written response agreeing with the Attorney General that certain enumerated payments should be made in the absence of an enacted appropriation, and joining in the Attorney General's request that the court enter an order confirming her authority to make such payments. (SR.V1.C53-65) Under the Supremacy Clause of the United States Constitution, this would include payments sufficient to ensure the State's compliance with the FLSA. (SR.V1.C53-54, 60) The Comptroller disagreed with the Attorney General, however, about what payments would be necessary to ensure that compliance by the July 9 deadline to establish payroll for the upcoming July 15 pay date, and proposed an alternative order to clarify its position. (SR.V1.C60-64; SR.V2. p.8)

The Comptroller submitted an affidavit of the Assistant Comptroller explaining that it would be operationally impossible by the July 9 deadline for the several agencies comprising 65,000 state employees to develop new systems that distinguish between workers who are covered and not covered by the FLSA and accurately limit payroll for those workers to the minimum wage and required overtime required under the FLSA. (SR.V1.C68) As a practical matter, the requested limit on the Comptroller's authority would result in ***no*** state workers being paid on July 15 or thereafter until extensive systems modifications could be implemented. (SR.V1.C69) This would take several months. (SR.V1.C69)

The Comptroller further established that, even if the agencies were somehow able to

process an FLSA-compliant payroll, doing so would require excluding all insurance, retirement, and garnishment payments, and other miscellaneous payroll deductions. (SR.V1.C68) The resulting payroll would be rejected for non-compliance with legally required withholdings. (SR.V1.C69) For example, state law requires the deduction of retirement contributions from the pay of state employees. (SR.V1.C69) The payment of an FLSA-mandated minimum wage without the required retirement contribution would cause the payroll to be rejected. (SR.V1.C69) Later, when the balance of the payment would be made after a budget is enacted, the payment would include retirement deductions applicable to the previously-paid minimum wage. (SR.V.1.C69) The amount of withholding would exceed the amount specified by state law, which would create another error and result in rejection by the Comptroller. (SR.V1.C69)

The existence of these practical problems, and their implications, are not in dispute. As the Comptroller pointed out below, the Attorney General's ***own verified complaint*** references the obstacles for the State in complying only with the minimum requirements of the FLSA. Specifically, the Attorney General confirms her understanding that it would take 9 to 12 months to prepare a payroll in compliance with the FLSA for the approximately 45,000 employees who work under the Illinois Central Management System. (S.R.V1.C8)

As noted in a letter from CMS' general counsel -- which the Attorney General attached to her complaint as Exhibit A (SR.V.1.C12-14) -- even if it were feasible to impose a temporary minimum wage regime on FLSA-covered workers during the budget impasse, myriad practical problems would result, including the following:

- Tens of thousands of payroll calculations would have to be manually adjusted, and those adjustments would be different from system-to-system within the State (and after a budget deal is reached, these payroll record calculations would then have to be readjusted manually back to standard salaries);

- Employees in the State Employees Retirement System ("SERS") would suffer from

distortion of income history and earning credits during a minimum-wage period;

- Health insurance and life insurance benefits for state employees may be distorted, as the costs of benefits are indexed to earnings;

- State employees with garnishments due to bankruptcy, child support or tax levies will be unable to make minimum payments "because federal guidelines will not allow them to occur in a minimum wage setting";

- Employees with bank loans (e.g., mortgages, car loans, student loan payments) may be unable to fund their automatic deductions and go into default.

(SR.V.1.C13)

CMS also identifies problems that would arise ***after*** the budget impasse is resolved and the State would have to "overpay" employees to make up for the diminished payments. This would present problems with respect to wage withholding tables for Social Security, Medicare and federal income tax. (SR.V.1.C14) The SERS system would suffer from incorrect earnings calculations that would permanently affect employees' retirement benefits. (SR.V.1.C14) Health and life insurance benefits would again be distorted. (SR.V.1.C14) The Attorney General has not disputed any of these facts.

The Comptroller also pointed out that the Attorney General has, in contrast with her current position, endorsed the Comptroller's state-law authority in the absence of an appropriations statute to make those payments that are necessary under the circumstances to comply with federal law. During a 2007 budget impasse, in a lawsuit filed on behalf of certain state employees, the State and the Comptroller, represented by "their counsel, Lisa Madigan, Attorney General of the State of Illinois," approved and entered an agreed order requiring the Comptroller to make payments to state employees sufficient to comply with the FLSA. (SR.V.1.C.62, 71-73) Then, as now, the State's payroll systems were not equipped to narrowly tailor those payments only to those employees covered by the FLSA and only at minimum wage.

In the Attorney General-approved order, the parties recognized that compliance with the FLSA may require payments to state employees beyond those strictly mandated under the statute, and permitted the Comptroller the flexibility to make those payments in order to ensure compliance:

> IT IS HEREBY ORDERED that Comptroller, Daniel W. Hynes, to the extent feasible, shall issue warrants or electronic payments sufficient to comply with the FLSA (29 U.S.C. §201 *et seq.*) to State employees. To the extent it is not feasible to limit the issuance of warrants or electronic payments only to those State employees and in such amounts necessary to comply with the FLSA, the Comptroller shall issue such other additional payroll warrants or electronic payments to ensure that the requirements of the FLSA have been satisfied, including payroll warrants or electronic payments to State employees that may not be covered by the FLSA.

(SR.V.1.C72)

Here, in response to the current motion, the Comptroller requested no more than what the Attorney General had previously endorsed as lawful and constitutional. (SR.V.1.C65)

At the July 7 "status," before CMS or the unions had filed any response to the motion, the court asked to hear argument on the merits. (SR.V.2. pp.13-14) Despite the position she took eight years before, the Attorney General argued that the state constitution and *American Federation of State, County & Municipal Employees, AFL-CIO v. Netsch*, 216 Ill. App. 3d 566 (4th Dist. 1991), categorically forbade the Comptroller from complying with the FLSA except by paying no more than the minimum wage to covered employees only. (SR.V.2. pp.15-22)

After argument, the court ruled immediately in the Attorney General's favor, stating that her decision was "constrained by the Illinois Constitution." (SR.V.2. p.39) According to the court, the Comptroller was "prohibited" under *Netsch* from paying state workers absent an enacted appropriation, but acknowledged a "narrow carve out" for compliance with the FLSA. (SR.V.2 p.39) Without making any reference whatsoever to considerations of irreparable harm, balance of hardships, or the public interest, the court ordered the Comptroller to process payroll

payment vouchers "that meet only the minimum requirements of the FLSA." (SR.V.2. p.42) The court dismissed as "not relevant" the undisputed evidence that it was operationally impossible for the Comptroller to comply with the FLSA without making payments beyond the law's minimum requirements. (SR.V.2. p.41) The court entered a written order reciting that the Attorney General had met certain elements required for injunctive relief, and stating that "Defendant is enjoined, in the absence of enacted appropriations legislation, from processing vouchers for payment of state employee payroll except vouchers that comply only with the minimum federal minimum wage and overtime requirements of the [FLSA]." (SR.V.1.C76-77)

The Comptroller and CMS seek reversal of the court's order and a remand to the circuit court with instructions to enter an order permitting the Comptroller to make those payments to state employees that are necessary to comply with the requirements of the FLSA.

STANDARD OF REVIEW

On appeal from an order granting a temporary restraining order, the court ordinarily applies an abuse of discretion standard. *See Northwestern Steel & Wire Co. v. Indus. Comm'n*, 254 Ill. App.3d 472, 476 (1st Dist. 1993). "However, where the trial court does not make any factual findings and rules on a question of law, the appellate court's review is *de novo*." *Makindu v. Ill. High Sch. Ass'n*, 2015 IL App (2d) 141201 ¶ 32.

ARGUMENT

I. The court erred in prohibiting the Comptroller from complying with federal law.

The issue in this appeal boils down to this: Does the State have to comply with federal law? The answer is, of course, an unequivocal yes. The circuit court erred by forcing the State to violate federal law. That result cannot stand.

The Attorney General argued, and the circuit court accepted, that this case can be decided

on the principles of "conflict preemption." This, however, is not a case about the scope of the "conflict preemption" doctrine. All agree federal law conflicts with the Appropriations Clause of the Illinois Constitution. All further agree that the federal law in question, the FLSA, trumps that state constitutional provision. The only legal question then is: can the executive branch be compelled by a court to violate that federal law simply to adhere to a state constitutional provision. No court in the country has suggested that the Supremacy Clause, the Illinois Constitution, the FLSA, or any "conflict preemption" authority compels such a result.

The Appropriations Clause of the Illinois Constitution provides that "[t]he General Assembly by law shall make appropriations for all expenditures of public funds by the State." Ill. Const. art. VIII, § 2(b). But the Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, a state court must apply and enforce federal law in the same manner as it would any law passed by the legislature of its own state. *See Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367-68 (1990). To the extent the application and enforcement of any federal law conflicts with the requirements of any state law, the federal law must be given precedence: "[T]he Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power." *New York v. United States*, 505 U.S. 144, 159 (1992) (citation omitted).

Therefore, regardless of state law restrictions on appropriations, even during a budget impasse, the State ***must*** comply with payments mandated by federal law. *See, e.g., White v. Davis*, 68 P.3d 74, 79 (Cal. 2003); *Council 13, Am. Fed. of State, County, & Mun. Employees, AFL-CIO v. Rendell*, 986 A.2d 63 (Pa. 2009).

Additionally, there is no support for the Attorney General's position in the language of

the FLSA itself. The FLSA does not prohibit the State from paying more than the federal minimum wage or prescribe how an employer must comply with those payment mandates. That is, after all, how the State complies with the FLSA every day. It pays employees more than the federal minimum wage and compensates them for earned overtime at wage rates the State sets. The FLSA also does not excuse compliance with its mandates because a state government employer may not have an enacted budget, a state constitutional provision conflicts with its mandates, or an employer cannot craft a solution that narrowly satisfies only the minimum payment requirements.[1]

The sole question is then the choice between violating the FLSA (because limiting compliance to the FLSA minimum is impossible) or complying with the FLSA by paying employees in full (because that is the only way currently possible in which the State can comply with the FLSA). The Attorney General has pointed to no constitutional, statutory, or case law authority, for there is none, to say that the Supremacy Clause excuses compliance with federal law when compliance with just the minimum requirements of that law is impossible. The Supremacy Clause requires the State to meet the FLSA. The State can do so only by paying employees in full. The State therefore must do so. There is no authority to the contrary.

The Attorney General's position is based almost entirely on a single Fourth District Appellate Court decision, *Netsch*, 216 Ill. App. 3d 566, which does not support the broad proposition for which it is cited, and ignores important Supreme Court precedent on this same

[1] In fact, Congress built liquidated and treble damage provisions into the FLSA precisely because it did not want employers, including state governments, failing to comply with the FLSA altogether. "[The damage provisions of the FLSA] constitute[] a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration for the worker to that minimum standard of well-being." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

topic that remains good law even after *Netsch*.

For starters, *Netsch* does not deal with the legal or factual scenario here, namely what happens when the State must comply with a federal mandate in the absence of a budget. In *Netsch*, the court simply reaffirmed that an enacted appropriation was necessary to issue paychecks to state workers except in certain circumstances, none of which were present there. The court was ***not*** faced with the question of how broadly or narrowly to craft an injunction that would permit the Comptroller to comply with the FLSA as required by the Supremacy Clause.

More important to this Court's decision than *Netsch* is the line of cases from the Illinois Supreme Court that affirm that the Appropriations Clause is not absolute, and there are exceptions that permit the Comptroller to continue to make payments in the absence of an express appropriation. Most recently, in *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 315 (2004), the Supreme Court held that the Appropriations Clause does not trump a state constitutional mandate to pay judicial pay increases. Likewise, in *Antle v. Tuchbreiter*, 414 Ill. 571, 579 (1953), the Supreme Court said that an analogous appropriations clause in the state constitution at the time did not prevent the State from paying for mandates in state law, similar to those in the FLSA. As the Court said, "where a statute categorically commands the performance of an act, so much money as is necessary to pay the command may be disbursed without explicit appropriation." *Id.*

The federal mandates in the FLSA deserve no less respect than the state law mandates under *Jorgensen* and *Antle*. To adopt the Attorney General's broad reading of *Netsch* would cause this Court to violate these precedents.

Thus, neither *Netsch* nor the Appropriations Clause itself compel the result below. Nor

has the Attorney General cited any case that addresses the issue.[2]

The Attorney General's response to the federal consent decrees proves this point. The Attorney General concedes that compliance with such decrees, including paying full salaries, as opposed to the FLSA minimum, to employees providing services under the decrees, is a must. The FLSA should be treated no differently. It, too, is supreme law. It, too, trumps the state constitution's appropriations requirement. Compliance is necessary in both instances.

In addition, the court's ruling cannot be reconciled with prevailing standards of equity, including in matters that touch upon constitutional issues. As the United States Supreme Court has noted, "in constitutional adjudication, as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Thus, "[i]n equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.* at 201. The "essence of equity jurisdiction" is the court's power to "mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944).

This means that, in certain circumstances, practical considerations are such that, in order to provide effective injunctive relief to those indisputably entitled to protection, benefits must be

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[2]Counsel for the Attorney General suggested below, misleadingly, that the supreme court of California had considered an analogous issue and rejected the comptroller's view that impossibility of compliance with the FLSA minimum justified paying all state employees to ensure compliance. (SR.V.2. p.37) In fact, the court did ***not*** rule on the comptroller's claim that it was "not feasible to determine and adjust all of the payments to state employees" to meet only the minimum federally required wage, and therefore that was necessary to pay all covered employees the full regular wages. *White v. Davis*, 68 P.3d 74, 107-08 (Cal. 2003). "The trial court never addressed this claim, and the Court of Appeal took note of the question but declined to address it for the first time on appeal." *Id.* The supreme court therefore had "no means of evaluating or resolving the Controller's factual claim of impossibility," and found that it was not appropriate to resolve the issue. *Id.* at 108.

extended to others who are not. *See, e.g., Bregsal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1988) (holding that injunctive relief "is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit ... ***if such breadth is necessary to give prevailing parties the relief to which they are entitled.***") (emphasis in original); *Sanjour v. United States Environmental Protection Agency*, 7 F. Supp.2d 14, 17 (D. D.C. 1998) (same). Here, the circumstances are such that complying with federal law necessarily requires the Comptroller to make additional payments that, while not compelled by the FLSA, are owed to public servants for work already performed.

Despite its current litigation position, the Attorney General recognizes that state law does not forbid the State from making payments beyond the minimum required under the FLSA if doing so is necessary to ensure compliance with federal law. The Attorney General approved an agreed order during a 2007 budget impasse that provided the same relief that the Comptroller sought here. (SR.V.1.C71-73) As an officer of the court, the Attorney General could not have embraced this practical solution had she believed it to be unconstitutional, as she now claims.

Counsel for the Attorney General dismissed the significance of the 2007 agreed order as "entered in very different factual circumstances," mainly with respect to the timing of when an appropriations statute might thereafter be enacted. (SR.V.2. pp.20-21) These purported circumstances, which are nowhere referenced in the agreed order and are not of a matter of record in this case, are, by their nature, the product of speculation.

Further, the Attorney General's rationale for distinguishing its position from eight years ago is not consistent with the position she takes now. If the Attorney General's current view of the law were to be credited, the purported "circumstances" surrounding the entry of the injunctive relief in 2007 would be of no consequence. Either an appropriations statute was

passed, or it was not. If the state constitution "constrained" the court below from allowing the Comptroller to make anything but the minimum payments required under the Act, the same state constitution would also have constrained the Attorney General and the court in Christian County eight years ago.[3] But it did not do so then, and should not do so now. The order below to the contrary is wrong as a matter of law, and the resulting injunction should be reversed.

II. The order does not satisfy the traditional requirements for injunctive relief.

The court's ruling rested exclusively on its erroneous view of what state law commands. As a result, the court essentially ignored that (a) the Attorney General failed to demonstrate any irreparable harm from denial of its requested relief, and (b) the balance of hardships and the public interest overwhelmingly favor the relief requested by the Comptroller. These are additional reasons for reversal, and also justify the order requested by the Comptroller.

The Attorney General failed to show that effectively preventing the Comptroller from paying any employees was necessary to prevent irreparable harm for which there is no adequate remedy at law. *See, e.g., Murges v. Bowman*, 254 Ill. App. 3d 1071, 1081 (1st Dist. 1993) (requiring this showing). The Comptroller proposes to pay in a timely manner all of the public servants who have been directed to work during this budget impasse for work already performed, regardless of whether they fall within the scope of the FLSA. Because each of these persons is ultimately entitled to be paid, and making these payments is necessary to ensure the State's compliance with the FLSA, the Attorney General has identified no meaningful irreparable harm.

On the other hand, absent this Court's intervention, the court's ruling blocking the Comptroller from processing payment vouchers for state employee payroll unless they comply

[3] The Attorney General has not explained why the alleged circumstances surrounding the 2007 agreed order should be deemed relevant to an evaluation of the lawfulness of ***that*** relief, while the undisputed circumstances relating to the capabilities of the State's payroll processing systems are "not relevant" (SR.V.2 p. 41) to evaluating the request for relief here.

with only the bare minimum required under the FLSA will result in ***no*** workers being paid, not even those covered by the FLSA, and potentially subject the state to federal fines and penalties. (SR.V.1.C68-69) The resulting harm to thousands of public servants who rely on their paychecks to put food on the table, pay rent, make mortgage, student loan and car payments, pay utility bills, and support their families is obvious and a matter of common sense. There is nothing equitable about forcing state employees to bear the burden of the budget impasse. Contrary to governing law, the court either ignored this issue altogether, or failed to give it the appropriate weight. *See Delta Med. Sys. v. Mid-Am. Med. Sys.*, 331 Ill. App. 3d 777, 788 (1st Dist. 2002) ("In addition, the trial court ***must*** then conclude that the balance of hardships to the parties supports the injunctive relief requested.") (emphasis added). *See also White*, 68 P.3d at 95 (case cited by Attorney General) (holding that trial court erred in granting preliminary injunction barring controller from making payments from state treasury in absence of an appropriation where court "did not provide any indication that it had considered or weighed the hardship that would be imposed by granting such an injunction against the hardship that would result from denying an injunction," and instead "rested simply on the trial court's agreement with the merits of plaintiffs' constitutional claim").

The court also failed to consider the practical problems that would result even if it were feasible to impose a minimum wage regime limited only to those employees covered by the FLSA. Tens of thousands of payroll calculations would have to be manually adjusted, and those adjustments would be different from system to system within the state (and after a budget deal is reached, these payroll record calculations would then have to be readjusted manually back to standard salaries). (SR.V.1.C13) Calculations relating to pensions and insurance benefits would be distorted. (SR.V.1.C13) State employees with garnishments due to bankruptcy, child support

or tax levies would be unable to make minimum payments. (SR.V.1.C13)

Additionally, the court ignored the impact of its injunction on the Comptroller's ability to comply with various federal court orders requiring the State, in connection with consent decrees, to pay employees "at a level no less than the levels paid in Fiscal Year 2015." (SR.V.1.C45-48) Complying with these directives would require the Comptroller and the State to pay employees in full—or, at the very least, at levels paid as late as June 30, 2015, the last day of FY 2015. But the order requires the Comptroller and the State to pay only the federal minimum wage and overtime, a fraction of an employee's salary, measured today or on June 30. Complying with both the court's order and these federal orders is simply impossible.

On the other hand, the practical result of adopting the Comptroller's position is that all workers who have been directed to show up for work during this budget impasse will be paid in the ordinary course ***and*** the State will meet its obligations under federal law, including orders relating to consent decrees, with none of the negative consequences outlined above. This result is plainly in the public interest. It is also equitable.

CONCLUSION

For the reasons set forth above, the Comptroller and CMS respectfully request the Court reverse the order of the circuit court and enter an order pursuant to Supreme Court Rule 366(a)(5) confirming the Comptroller's authority to process payment vouchers in full if that is required to comply with the FLSA. In the alternative, the Court should remand with instructions to enter such an order.

David C. Gustman
Michael J. Kelly
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Dated: July 9, 2015

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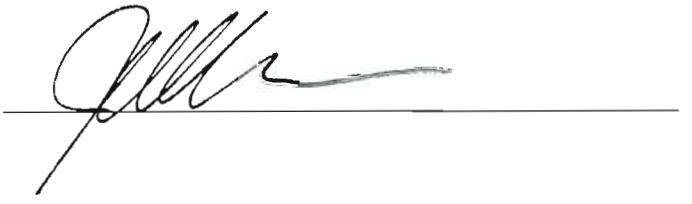

Exhibit B

No. 1-15-1877

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LESLIE GEISSLER MUNGER, in her capacity as Comptroller of the State of Illinois, Defendant-Appellant, and ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, Intervenor-Appellant, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*, Intervenors.	)	Interlocutory Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 2015 CH 10243 The Honorable DIANE JOAN LARSEN, Judge Presiding.

RESPONSE OF THE PEOPLE OF THE STATE OF ILLINOIS TO SUPREME COURT RULE 307(D) PETITION FOR REVIEW

Plaintiff-Appellee People of the State of Illinois, by Lisa Madigan, Attorney General of Illinois, ask this Court to deny Appellants' Supreme Court Rule 307(d) petition for review of the temporary restraining order entered by the Circuit Court of Cook County in this matter. The circuit court did not abuse its discretion when it entered an order enjoining Defendant-Appellee Leslie Geissler Munger, as Comptroller of the State of Illinois, from authorizing the payment of state employee payroll in the absence of enacted appropriations statutes except as necessary to meet the requirements of the federal Fair Labor Standards Act (FLSA).

I. Introduction

This Court should affirm the entry of the temporary restraining order. This litigation arose because of the State's Fiscal Year 2016 budget impasse. The Appropriations Clause of the

Illinois Constitution assigns the power of the purse to the legislature: "The General Assembly by law shall make appropriations for all expenditures of public funds by the State." ILL. CONST., art. VIII, § 2(b). Properly applying this constitutional mandate, the temporary restraining order enjoins the Comptroller, in the absence of enacted appropriations statutes, from authorizing payment of state employees except as necessary to comply with the requirements of the FLSA (which mandates payment of federal minimum wage and overtime to non-exempt employees). The circuit court correctly recognized that, through the Supremacy Clause of the United States Constitution, the FLSA preempts the Illinois Constitution's Appropriations Clause only to the extent that the two provisions actually conflict. The circuit court thus correctly gave effect both to federal law and the Illinois Constitution and its order should be affirmed.

II. Statement of Facts

The People of the State of Illinois filed a verified complaint for declaratory and injunctive relief to clarify the Comptroller's authority to disburse State funds in the absence of enacted appropriations statutes for non-education spending for the 2016 Fiscal Year, which began on July 1, 2015 (Vol. I, 1-14).[1] The Illinois Department of Central Management Services (CMS) and several unions representing state employees were allowed to intervene without objection (Vol. I, 51; Vol. II, C. 5-6).

The People filed a verified motion for a temporary restraining order and preliminary injunction (Vol. I, C. 16-48). The People sought confirmation of the Comptroller's authority to make certain payments for which appropriations statutes are not required under Illinois law and

[1] Governor Rauner signed the appropriations legislation for primary and secondary education. On June 25, 2015, the Governor amendatorily vetoed the capital bill and completely vetoed the bills for all other state spending.

payments that federal law required (Vol. I, C. 18-21, 30). These included payments for continuing appropriations, payments from non-appropriated State funds, payments for the judicial branch, payments required by federal court consent decrees, and payments required because of the the State's participation in federal programs (*id.*). The circuit court entered an agreed interim order authorizing the Comptroller to make most of these payments (Vol. I, C. 78-84).

The People also sought clarification of the Comptroller's authority to disburse paychecks to state employees in the absence of enacted appropriations statutes (Vol. I, C. 20-21, 30). The People asserted that, in the absence of enacted appropriations statutes, the Comptroller lacked authority under Illinois law to authorize payment of wages to State employees (Vol. I, C. 20). The FLSA's requirements apply to States under the Supremacy Clause of the United States Constitution, however, and mandate payment of federal minimum wage and overtime to non-exempt state employees even in the absence of enacted appropriations statutes (*id.*). Therefore, the People requested that the circuit court authorize the Comptroller to process payment vouchers for covered state employees only to the extent required by the FLSA's minimum wage and overtime provisions or, in the alternative, the People requested that the court direct the Comptroller not to process vouchers for state employees pay in the absence of payroll vouchers that complied only with the requirements of the FLSA (Vol. I, C. 30).

The Comptroller's response to the motion agreed with the People on many matters, but disagreed with respect to payment of state workers (Vol. I, C. 53-65). The Comptroller argued that it could not, as a practical matter, comply only with the requirements of the FLSA for payment of minimum wage and overtime to non-exempt employees (Vol. I, C. 61). The Comptroller sought authority to issue full payments to all state employees, maintaining that this

was necessary to assure compliance with the FLSA's minimum wage and overtime provisions (Vol. I, C61, 65).

The Comptroller attached to her response the affidavit of Marvin Becker, an Assistant Comptroller whose duties include processing of employee payrolls (Vol. I, C. 68-69). Becker stated that the Comptroller had established July 9, 2015 as the deadline for agencies to submit payroll information for employees who were to be paid on July 15 (Vol. I, C. 68); that it was not practically possible for agencies to determine which employees are covered by the FLSA before July 9 (*id.*); and that any attempt to pay covered State employees only the minimum wage and overtime required by the FLSA would exclude various payroll deductions, including deductions for withholding orders and retirement contributions (Vol. I, C. 68-69). Excluding the retirement contribution, Becker stated, would cause the Comptroller to reject the payroll (Vol. I, C 69). Becker further stated that extensive systems modifications would have to be implemented to create a payroll system that would implement requirements of the FLSA, and CMS had estimated that this would take between 9 and 12 months (Vol. I, C. 69).

On July 7, 2015, the circuit court conducted a hearing on the People's motion (Vol. II, C. 1-48). The circuit court agreed with the People that the Illinois Constitution prohibited payment of wages to State employees without enacted appropriations statutes except to the extent that the FLSA requires federal minimum wage and overtime payments, and that the alleged inability of CMS and the Comptroller to create and process an FLSA-compliant payroll did not justify ignoring the Illinois Constitution (Vol. II, C. 39). The court entered a temporary restraining order that enjoined the Comptroller, "in the absence of enacted appropriations legislation, from processing vouchers for payment of state employees payroll except vouchers that comply only with the minimum federal minimum wage and overtime requirements of the federal Fair Labor

Standards Act." (Vol. I, C. 98).

III. Legal Standard

To be entitled to a temporary restraining order, a plaintiff has the burden of demonstrating: (1) a concrete right in need of protection; (2) an inadequate remedy at law; (3) irreparable harm should the injunction not issue; and (4) a likelihood of success on the merits. *Am. Fed'n of State, Cnty., and Mun. Employees, Council 31 v. Ryan*, 332 Ill. App. 3d 965, 966 (1st Dist. 2002). Additionally, the court "must determine if the balance of the hardships to the parties" supports the interlocutory injunctive relief. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 169 (1st Dist. 2002).

The decision to grant a temporary restraining order is within the sound discretion of the circuit court, and that decision will not be overturned absent an abuse of that discretion. *Bradford v. Wynstone Property Owner's Ass'n*, 355 Ill. App. 3d 736, 739 (2d Dist. 2005). This standard provides "great deference" to the circuit court. *Corral v. Mervis Indus., Inc.*, 217 Ill. 2d 144, 152 (2005). The abuse of discretion standard "gives the most deference to the trial court and has been said to be 'next to no review at all.'" *People v. Collins*, 366 Ill. App. 3d 885, 898, (1st Dist. 2006) (quoting *In re D.T.*, 212 Ill. 2d 347, 356 (2004)). A court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable or no reasonable person would reach the same result. *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2d Dist. 2006).

IV. The circuit court did not abuse its discretion when it granted the temporary restraining order.

The circuit court properly applied the Illinois Constitution in issuing the temporary restraining order. Appellants misrepresent the circuit court's order as requiring them to violate federal law. Memo at 7-8. But the order does the exact opposite: it expressly

authorizes them to comply with federal law (Vol. I, C. 98). The fact that appellants feel that they are unable to comply with the FLSA requirements does not then justify wholesale disregard of the Illinois Constitution. Indeed, appellants have known since 2007 that they would need to comply with the requirements of the FLSA in the event of a budget impasse (Vol. I, C. 62).

The basic flaw in appellants' argument is that their claim that it is infeasible to comply with federal law is, as a matter of law, irrelevant. They ignore that the only reason the Comptroller may authorize *any* payments to state employees is because, via the Supremacy Clause, the FLSA preempts Illinois appropriations law and that the scope of preemption is limited. Appellants argue that the scope of preemption is not important. They are wrong: it is dispositive.

A. The People established a fair question of likelihood of success on the merits.

The starting point for the scope of the Comptroller's authority under the Illinois Constitution is the Finance Article. The Appropriations Clause of that Article states: "The General Assembly by law shall make appropriations for all expenditures of public funds by the State." ILL. CONST. art. VIII, § 2(b). This clear directive was considered by the appellate court in the same factual circumstances presented here in *AFSCME v. Netsch*, 216 Ill. App. 3d 566 (4th Dist. 1991) (per curiam). There, public labor unions brought a mandamus lawsuit to require the Comptroller to authorize full payment of employee wages in the absence of enacted appropriations statutes. *Id.* at 567. The court explained that, pursuant to the Appropriations Clause, "[o]nly the General Assembly is authorized by our constitution to make appropriations for all State expenditures of public funds." *Id.* The court continued that an "appropriation bill is necessary" to pay state employee salaries and "any attempt by the comptroller to issue the funds in the absence of an appropriation bill signed into law by the governor would create obvious

problems under the separation-of-powers doctrine." *Id.* at 568. The court concluded that because "the legislature has not passed an appropriation which the governor has signed into law, the comptroller is prohibited from issuing paychecks to State workers at this time." *Id.* at 569. *Netsch*, then, provides the baseline rule that the Illinois Constitution precludes the Comptroller from paying state employees in the absence of enacted appropriations statutes.

But as the circuit court correctly determined, there is a limited exception to this rule provided by the Supremacy Clause of the United States Constitution, which declares that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The Supremacy Clause requires the State to comply with the FLSA, regardless of state laws requiring an appropriation. *See Council 13, AFSCME v. Rendell*, 986 A.2d 63 (Pa. 2009); *White v. Davis*, 68 P.3d 74 (Cal. 2003).

The FLSA, however, does not require full payment of employee wages, nor does it justify payment of full wages where that would be contrary to a State's appropriations laws. By its terms, the FLSA requires payment of federal minimum wage and overtime to non-exempt employees. 29 U.S.C. §§ 206, 207. "The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); 29 U.S.C. § 202(a). The FLSA "was designed to give *specific minimum protections*" to covered workers. *Barrentine*, 450 U.S. at 739 (emphasis added). The statute does not require payment of full wages to all employees.

Under the doctrine of conflict preemption, the FLSA preempts Illinois appropriations laws only to the extent that it requires compliance with the wage and overtime provisions — the

specific minimum protections for covered workers. *See Rendell*, 986 A.2d at 82 (FLSA preempts Pennsylvania appropriations requirement as matter of conflict preemption). "Conflict preemption analysis should be narrow and precise, to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Wimbush v. Wyeth*, 619 F.3d 632, 643 (6th Cir. 2010) (internal quotation marks omitted); *see Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515 (1989). In a conflict preemption analysis, the court gives effect to the "basic purpose" of the federal law, *see Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 41 (2010), but the court also presumes that Congress did not intend to displace state law, *N. Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n*, 392 Ill. App. 3d 542, 563 (2d Dist. 2009). Therefore, under conflict preemption, a state law "is void to the extent that it actually conflicts with a valid federal statute." *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978); *see Wilson v. Chism*, 279 Ill. App. 3d 934, 937 (1st Dist. 1996).

Because federal law does not *require* more than payment of federal minimum wage and overtime to covered employees, it does not justify paying anything beyond that under Supremacy Clause preemption of the Illinois Constitution's Appropriations Clause. There is no authority for the proposition that complying with more than the FLSA minimum is required by the Supremacy Clause or permitted by the Appropriations Clause.

Instead, appellants present this Court with a false choice, claiming that because they believe that they cannot comply with only the minimum requirements of federal law, they should be allowed to exceed those requirements regardless of Illinois constitutional law. This choice, however, misunderstands the basis for authorizing payment of *any* state employee wages in the absence of enacted appropriations statutes. The *sole* reason the Comptroller can authorize payment of state employees is because federal law preempts the State's appropriations law, and

there is no dispute federal law preempts that law only to the minimum extent possible.

Appellants further contend that the FLSA "does not prohibit the State from paying more than the federal minimum wage" (Memo at 9), which is unquestionably true. But the issue categorically is not what federal law *permits*, it is what federal law *requires*. And federal law does not *require* the State to do that. Moreover, the Illinois Constitution *does* prohibit the State from paying more than federal minimum wage. *See Netsch*, 216 Ill. App. 3d at 566-68.

The Illinois Constitution is not a document that can be disregarded when it is convenient to do so. The real choice the State faces is to pay employee salaries only to the extent required by the FLSA or to be subject to damages under that statute. In other words, the FLSA itself provides the answer to what happens if the State cannot comply with it. That the State may not be prepared to comply with the FLSA requirements — despite being on notice for 8 years — is not justification to disregard the Appropriations Clause.

While appellants, relying exclusively on non-Illinois precedent, argue that, as a matter of equity, they should be allowed to disregard the Illinois Constitution (Memo at 11-12), their argument is misguided for the additional reason that, as a matter of Illinois law, injunctive relief should be as narrowly tailored as possible. The Illinois Supreme Court has explained that an injunction "should only be as broad as is essential to safeguard the rights of the plaintiff." *Vill. of Wilsonville v. SCA Servs., Inc.*, 86 Ill. 2d 1, 29 (1981); *see also People v. Smith*, 2012 IL App (1st) 113591, ¶ 24 (same). Here, the People's rights are safeguarded by the temporary restraining order, and that order is only as broad as is necessary to protect those rights — it permits an exception to the plain requirement of the Illinois Constitution that appropriations statutes be enacted before state funds are expended only to the extent compelled by federal law. Appellants ask this Court to disregard this rule and order a broader injunction than necessary in violation of

traditional equitable rules (as well as the Illinois Constitution).

Appellants also argue that the People read *Netsch* too broadly. Memo at 9. They are wrong. First, they ignore that the Illinois Supreme Court has cited *Netsch*'s holding with approval. *McDunn v. Williams*, 156 Ill. 2d 288, 308 (1993) ("[A]ny attempt by the Comptroller to pay a position not authorized by the legislature would raise serious separation of powers problems."). Second, the fact that *Netsch* was not examining the scope of a federal mandate is not relevant. Instead, the foregoing conflict preemption analysis provides a narrow exception to *Netsch* but does not change the fact that *Netsch* is the general rule that must be followed.

Likewise, appellants' reliance on *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004), is misplaced. *Jorgensen* was concerned with a different separation-of-powers problem than is posed by appellants' argument. There, the court held that the failure to appropriate money for cost-of-living adjustments to judges violated the state constitutional provisions preventing diminishment of judicial salaries and further explained that it would violate the separation of powers for the legislature and Governor to fail to fund the operations of the judicial branch. *Id.* at 307-15. Thus, in *Jorgensen*, the rule of *Netsch* that no funds may be spent in the absence of appropriations legislation gave way to other requirements of the Illinois Constitution itself. Here, however, the funding of the judicial branch is not at issue, and there is no other constitutional provision that overrides the Appropriations Clause.

Fourth, appellant's reliance on *Antle v. Tuchbreiter*, 414 Ill. 571 (1953), is even less justified. They cite *Antle* for the proposition that where a statute requires the performance of an act, "so much money as is necessary to pay the command may be disbursed without explicit appropriation." *Id.* at 579. The FLSA, however, does not require expenditure of any more money than payment of federal minimum wage and overtime to non-exempt employees. That is

all the statute mandates, and that is all that may be spent in the absence of explicit appropriation.

Appellants also argue that a 2007 order entered by the Circuit Court of Christian County demonstrates that the Comptroller may be authorized to pay the full state payroll when compliance with the FLSA's minimum mandates is too difficult. Memo at 12-13. But the plain terms of that order specify that it was for only a limited duration — not the indefinite terms appellants apparently now seek — and it explicitly states that it is not to be considered precedent for future litigation (Vol. 1 C. 71-73). Additionally, as the circuit court noted, appellants have had since 2007 to become ready to comply with the FLSA's minimum requirements. (Vol. II, C.40). And in any event, that circuit court order cannot trump the Illinois Constitution or *Netsch*.

B. The People established irreparable harm.

Appellants incorrectly assert that the People have not identified any irreparable harm addressed by the circuit court's temporary restraining order. Memo at 13. The temporary restraining order prevented unauthorized expenditure of State funds in violation of the Illinois Constitution. As the People explained to the circuit court (Vol. I, C. 23), the wrongful expenditure of public funds causes irreparable injury to the People. *See Granberg v. Didrickson*, 279 Ill. App. 3d 886, 889 (1st Dist. 1996) ("If the challenged funds had been expended, plaintiffs would be irreparably harmed ... as taxpayers ....by the improper expenditure of public funds. Illinois courts have long viewed public funds as being held in trust on behalf of all taxpayers and have recognized that the wrongful expenditure of public assets necessarily harms the public.") (citations omitted).

Furthermore, harm would result from disregarding the appropriation process set forth in the Illinois Constitution, which requires the General Assembly and the Governor to enact appropriations statutes. *See Netsch*, 216 Ill. App. 3d at 566-67. Therefore, the Illinois

Constitution's separation of powers doctrine prevents the Comptroller from authorizing payment of employee salaries in the absence of enacted appropriations statutes (except as required by federal law). *See Bd. of Trs. of Cmty. College Dist. No. 508 v. Burris*, 118 Ill. 2d 465, 479 (1987).

In *Burris*, the amount appropriated by the legislature for reimbursement of veterans' scholarship payments had been reduced because of the Governor's amendatory veto of an appropriations bill, and that amount was insufficient to satisfy statutory requirements. *Id.* at 478. The Illinois Supreme Court nevertheless held that the Comptroller properly refused to reimburse a community college district for the full amount it had expended for veterans' scholarships, reasoning that if it accepted the college's view, "the Comptroller, in essence would be able to 'override' the action of the legislature and the Governor in making these reductions in an appropriations bill, creating obvious problems under the separation of powers doctrine." *Id.* at 479. Likewise the temporary restraining order entered by the circuit court prevents serious and irreparable harm to the taxpayers by preventing the wrongful expenditure of funds and by avoiding separation-of-powers problems.

C. The balance of harms favors the injunctive relief.

In considering whether to grant injunctive relief, courts will also balance the harms that will be suffered from granting and denying injunctive relief. *See Delta Med. Sys. v. Mid-America Med.. Sys., Inc.* 331 Ill. App. 3d 777, 789 (1st Dist. 2002). When courts do this, they should take the public interest into account. *Granberg*, 279 Ill. App. 3d at 890.

The circuit court did not abuse its discretion in determining that a balancing of harms favored issuance of the temporary restraining order in light of the serious and irreparable harm that it prevents, including the wrongful expenditure of considerable taxpayer funds and the

separation-of-powers concerns described above. The public interest in adherence to the limitations set forth in the Illinois Constitution also weighs in favor of the temporary restraining order. Illinois voters adopted the Constitution in a 1970 referendum (*see* James W. Hilliard, *The Illinois Constitution: A Primer*, 96 Ill. B.J. 494, 195 (Oct. 2008)), and they have a strong interest in assuring that it is followed. The circuit court's temporary restraining order is consistent with this public interest, and it preserves the constitutional scheme for appropriations and expenditure of public funds that the People adopted when they voted to approve the Constitution.

In conclusion, the circuit court did not abuse its discretion in entering the temporary restraining order. There is no dispute that the Appropriations Clause bars the payment of state employees in the absence of enacted appropriations statutes or that federal law provides a narrow exception to that rule. But appellants are wrong when they state that the difficulty of complying with federal law justifies full payment of the state payroll. Federal law does not require that nor does the Illinois Constitution permit it. Instead, the Illinois Constitution assigns to the General Assembly and the Governor the duties of enacting appropriations statutes for the expenditure of public funds. Appellants cannot ignore those constitutional mandates because it is convenient. The circuit court properly recognized that and its order should be affirmed.

Respectfully submitted,

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July 13, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 13, 2015, I caused a true and correct copy of the foregoing Response of the People of the State of Illinois to Supreme Court Rule 307(d) Petition for Review to be served by hand delivery upon the following parties:

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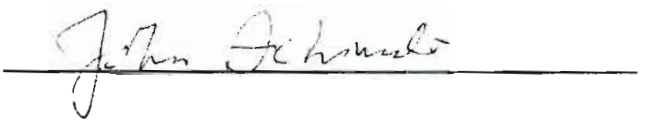

Exhibit C

No. 5-15-0277

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 31, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31; ILLINOIS TROOPERS LODGE NO. 41, FRATERNAL ORDER OF POLICE; ILLINOIS NURSES ASSOCIATION; ILLINOIS FEDERATION OF PUBLIC EMPLOYEES, LOCAL 4408 IFT-AFT; ILLINOIS FEDERATION OF TEACHERS, LOCAL 919; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL; LABORERS INTERNATIONAL UNION OF NORTH AMERICA-ISEA LOCAL 2002; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 73; SEIU HEALTH CARE ILLINOIS & INDIANA; SEIU LOCAL 1; TEAMSTERS LOCAL UNION NO. 705, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; CONSERVATION POLICE LODGE OF THE POLICE BENEVOLENT ARID PROTECTIVE ASSOCIATION, Plaintiffs-Appellees, v. STATE OF ILLINOIS, and LESLIE GEISSLER MUNGER, in her official capacity as Comptroller for the State of Illinois, Defendants-Appellants.	)	Interlocutory Appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois. FILED JUL 13 2015 JOHN J. FLOOD CLERK APPELLATE COURT, 5TH DIST. No. 2015 CH 475 The Honorable ROBERT P. LECHIEN, Judge Presiding.

DEFENDANTS' MEMORANDUM IN SUPPORT OF RULE 307(d) PETITION FOR REVIEW OF TEMPORARY RESTRAINING ORDER

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INTRODUCTION

This appeal raises critical issues relating to the lack of enacted appropriations statutes for the current fiscal year, which began on July 1, 2015. Plaintiff labor unions sought injunctive relief requiring the State of Illinois and the Illinois Comptroller[1] "to pay [union members who are state employees their] wages and salaries earned in the current fiscal year on a timely basis," notwithstanding the lack of appropriations. (S.R. 18-19.) This appeal challenges the circuit court's entry of a temporary restraining order ("TRO") requiring the Comptroller to make such payments to members of the Plaintiff unions and to all other state employees.

Although Plaintiffs acknowledge the lack of enacted appropriations statutes,[2] their Complaint and the circuit court's TRO do not mention the Appropriations Clause of the Illinois Constitution, which provides that "[t]he General Assembly shall make appropriations for all expenditures of public funds by the State" (Ill. Const. art VIII, § 2(b)). The Complaint and TRO also fail to mention *American Federation of State, County and Municipal Employees, AFL-CIO v. Netsch*, 216 Ill. App. 3d 566, 567-69 (4th Dist. 1991) (per curiam), which held, in virtually identical circumstances, that the Appropriations Clause prohibited the Comptroller from authorizing wage and salary payments to state employees without enacted appropriations statutes.

In this case, Plaintiffs attempted to avoid the effect of the Appropriations Clause by claiming that it is subject to an exception for rights secured by the Contracts Clause, which states that "[n]o . . . law impairing the obligation of contracts . . . shall be passed." (Ill. Const. art. I, § 16). The circuit court first held that Plaintiffs' claim to enforce their contractual rights is not barred by

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[1] As discussed below, the defendant, Illinois Comptroller Leslie Geissler Munger, is a nominal party to Plaintiffs' claims. In the circuit court, the Comptroller was represented by the Attorney General as well as by unauthorized attorneys who appeared at the July 9, 2015 hearing before the circuit court, and the Comptroller has a pending motion to disqualify the Attorney General from acting on her behalf in this litigation. No matter who represents the Comptroller, however, the State is the real party in interest. As a result, at this time, the Attorney General is not asserting any arguments on the Comptroller's behalf.

[2] An enacted appropriation statute was passed to cover education, but the Governor vetoed all other appropriations legislation.

the State's sovereign immunity, although such immunity applies to claims "founded upon any contract entered into with the State of Illinois." 705 ILCS 505/8 (2014). It further held that Plaintiffs stated a valid claim for relief under the Contracts Clause. The circuit court entered the TRO, which directed the Comptroller to "draw and issue warrants accomplishing payment of wages to the Plaintiffs' members "and" to all other state employees at their normal rates of pay until further order of court." (S.R. 162.)

The TRO is based on clear errors of law that require reversal. As a threshold matter, the circuit court lacked jurisdiction over this action because Plaintiffs' claim is "founded upon" on an alleged contract with the State, and thus is within the exclusive jurisdiction of the Court of Claims. The circuit court therefore lacked authority to grant Plaintiffs *any* relief, including the TRO. Plaintiffs' Complaint also failed to state a legally valid cause of action, and so could not support any injunctive relief against Defendants. Plaintiffs' attempt to characterize a breach of contract claim as a claim for violation of the Contracts Clause fails as a matter of law. Under long-established precedent, an unconstitutional "impairment" of a contract, as oppose to a "breach," results only from the *passage* of legislation that reduces a contracting party's rights or remedies, not from a mere failure to perform due to the *non-passage* of legislation appropriating the necessary funds. Moreover, the plaintiffs' position raises the specter that any officer of the State could essentially override the legislature's appropriations authority by entering into a contract, whether with employees or other contracting parties.

For several additional reasons, the TRO represented an abuse of discretion. Over the Attorney General's objection, the circuit court improperly allowed unauthorized counsel to (i) represent the Comptroller in her official capacity, (ii) purportedly waive sovereign immunity and join all of the Plaintiffs' arguments, and (iii) confess judgment and agree to a TRO requiring the expenditure of state funds in the absence of enacted appropriations statutes. In addition, in light of a previously pending parallel action in Cook County, in which the circuit court had entered a TRO *prohibiting* the Comptroller from doing what Plaintiffs requested here, and the Appellate Court

had denied the request to do what Plaintiff requested here, the circuit court in this case erred by entertaining that request, leading to conflicting court orders.

STATEMENT OF FACTS

Plaintiffs' Claim

Plaintiffs are labor unions that represent various state employees and, on these employees' behalf, entered into multiple collective bargaining agreements with the State. (S.R. 2-12; Compl. at 4-21).[3] Plaintiffs' Complaint admits the absence of enacted appropriations statutes for this fiscal year. (S.R. 2.) Plaintiffs also allege that, without an enacted appropriation, the Comptroller will not issue payroll warrants to state employees for work performed after July 1, 2015 "in the absence of a court order authorizing her to do so." (S.R. 11, ¶¶ 35-36.)

Plaintiffs' Complaint relies on Section 13 of the State Comptroller Act, which deals with compensation for state employees. (S.R. 9-10.) Plaintiffs assert that, under Section 13, the Comptroller is "responsible for ensuring that State employees are paid on a timely basis. 15 ILCS 405/13." (S.R. 9.)[4] Plaintiffs acknowledge Section 9(c) of the State Comptroller Act (S.R. 11, ¶ 37), which states that for each payment voucher submitted to the Comptroller, she "shall refuse to draw a warrant" if she "determines that unencumbered appropriations . . . are not available from which to . . . make the expenditure." 15 ILCS 405/9(c) (2014).

Plaintiffs' single "Impairment of Contract" count claims that the State's failure to pay state employees for work performed in the current fiscal year is an unconstitutional impairment of their contractual rights. (*S.R.* 12-14, ¶¶ 44-52). Plaintiffs allege that employees covered by various

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[3] This Statement of Facts accepts as true for purposes of this appeal the well-pled allegations of historical fact in Plaintiffs' Complaint, but not factual or legal conclusions.

[4] In *Netsch*, the appellate court, addressing the plaintiff unions' similar reliance on Section 13 "for the proposition that the comptroller is required to pay State employees' salaries," held that "Section 13 of the Act is not an expenditure authority." 216 Ill. App. 3d at 568. *Netsch* explained that "[w]hile this section describes the means by which the comptroller is required to disburse salaries, it is not authority for the expenditure of any fund or funds which have not been appropriated for that purpose." *Id.*

collective bargaining agreements "have a contractual right to be paid in a timely fashion for their work," and that "Defendants failure to timely pay the wages required by these collective bargaining agreements impairs the obligations in those agreements." (S.R. 13, ¶¶ 45-46.)[5]

The Cook County Suit

On July 1, 2015, before Plaintiffs filed this action, the Attorney General filed a complaint in the Circuit Court of Cook County, entitled *People of the State of Illinois v. Munger*, 2015 CH 10243, seeking the court's direction as to which payments the State is required to make, and thus the Comptroller must pay, in the absence of enacted appropriations statutes, given the restrictions of the Appropriations Clause. (S.R. 110-120.) On July 2, 2015, several labor unions, including AFSCME, the largest union for state employees, intervened and argued in that action (S.R. 122.). On July 7, 2015, the Court entered a TRO that, pursuant to the Supremacy Clause of the U.S. Constitution, authorized the Comptroller to make specified payments expressly mandated by the federal Fair Labor Standards Act (the "FLSA") but prohibited the Comptroller from processing payment vouchers for general state employee payroll beyond what is required to comply with the FLSA. (S.R. 124-25.) An appeal from that order was filed the same day. (S.R. 127.) The following day, the appellate court granted in part an emergency motion and stayed the TRO pending resolution of the expedited appeal. (S.R. 132.) The appellate court also denied the request by the Comptroller and Department of Central Management Services for an order authorizing and directing the Comptroller to process vouchers to pay full payroll for all state employees. (S.R. 132.)

St. Clair Circuit Court Ruling on Motion to Dismiss and Motion for TRO

The next day, July 9, 2015, the St. Clair County Court heard argument on Defendants'

[5] Plaintiffs' impairment of contract claim also contends that Sections 8 and 8.a of the Illinois Personnel Code (20 ILCS 415/8, 8.a (2014)), combined with Section 310.90 of the "Pay Plan" promulgated under the authority granted by those sections, "create employment agreements between the State and the employees subject to the Governor" that require "fair and reasonable compensation for services rendered." (S.R. 17, ¶¶ 48-50.) (The Pay Plan is available at *www2.illinois.gov/cms/xEmployees/Personnel/Pages/PersonnelPayPlan.aspx* (accessed on July 10, 2015)).

motion to dismiss and Plaintiffs' motion for a TRO. (S.R. 167-255.) At the beginning of the hearing, attorneys from the Office of the Comptroller appeared at the Comptroller's request and, over the Attorney General's objection that they were not legally authorized to do so, purported to represent the Comptroller in her official capacity. (S.R. 189-191.) They also filed a motion to disqualify the Attorney General from representing the Comptroller, which the court took under advisement. The court allowed these unauthorized attorneys to represent the Comptroller and take positions aligned with Plaintiffs. Among other things, these attorneys purported to waive sovereign immunity, stated their agreement with Plaintiffs' theory that the State's nonperformance of a contract due to the absence of enacted appropriations statutes constitutes an unconstitutional impairment of that contract and is not barred by sovereign immunity, and urged the court to expand the relief requested by Plaintiffs to include *all* state employees, not just ones represented by Plaintiffs. (S.R. 181-184.)

The court first considered Defendants' motion to dismiss, starting with the issue of sovereign immunity.[6] Although the motion was filed on behalf of both Defendants, the court held that "[t]he State's Motion to Dismiss, in which the Comptroller does not join, on the grounds of sovereign immunity is denied as to Comptroller and allowed as to the State of Illinois." (S.R. 161.)[7] The court next addressed the legal sufficiency of Plaintiffs' claim that the absence of a legislative appropriation for the current fiscal year constitutes an unconstitutional impairment of

[6] The court issued its written opinion on July 10, 2015 at approximately 2:50 p.m.

[7] Even though the circuit court granted the motion to dismiss on sovereign immunity grounds as to the State, the State maintains standing to pursue this appeal because it has a direct, immediate and substantial interest that is prejudiced by the TRO and would be benefitted by its reversal. *In re O.H.*, 329 Ill App. 3d 254, 257 (3d Dist. 2002); *In re Estate of Strong*, 194 Ill App. 3d 219, 225 (1st Dist. 1990); *People v. White*, 165 Ill.App.3d 249, 253 (1988). That principle applies even to parties dismissed from the case. *People ex rel. Voss v. O'Connell*, 252 Ill. 304, 310-11 (1911). In light of the impact of the TRO upon State finances, the State has a substantial interest that is prejudiced by the TRO. See also *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 483-84 (1992) ("The Attorney General has the common law duty to protect the public purse as a matter of general welfare.").

Plaintiffs' alleged contractual rights. The court noted that the Attorney General argued that the Complaint does not state a cause of action against the Comptroller, but stated that "the Comptroller, by separate counsel, agrees that Plaintiffs' [sic] have stated a case. Further, the Comptroller moves that the court authorize the Comptroller to process pay checks and direct deposits ...for the members of the Plaintiff labor organization *and* all other employees of the State." (S.R. 161.) Citing *Dixon Association v. Thompson*, 91 Ill .2d 518 (1982), and *Jorgensen v. Blagojevich*, 211 Ill.2d 286 (2004), the court ruled (S.R. 161):

> [T]he executive and legislative branches of state government have failed to reach an agreement on the budget and appropriations are frozen beginning July 1, 2015. Payment for work performed and to be performed will be withheld. This inaction threatens the financial survival of the employees of the State of Illinois. . . . The court finds that Plaintiffs' [sic] have stated a proper cause of action for impairment of contract.

The court then granted Plaintiffs' motion for a TRO. Addressing Plaintiffs' likelihood of success on their Contracts Clause claim, the court, referring to Plaintiffs' collective bargaining agreements, the Public Labor Relations Act, the Personnel Code, and the Pay Plan, stated:

> [T]he failure to provide the appropriation to pay workers who are required to go to work constitutes an impairment of contract. The court concludes that the Plaintiffs have demonstrated a likelihood of success on the merits.

(S.R. 162.) The court also found that Plaintiffs' members have no adequate remedy at law, and that the balance of equities favored them. (S.R. 162.) The court ordered the Comptroller to "draw and issue warrants accomplishing payment of wages to the Plaintiffs' members at their normal rates of pay." (S.R. 162.) After the oral request of the Comptroller, the court expanded the relief to include "all other state employees at their normal rates of pay until further order of the court." (S.R. 162.)

ARGUMENT

I. Standard of Review

As a general matter, a circuit court's decision whether to grant a TRO is reviewed under an abuse of discretion standard. *AFSCME v. Ryan*, 332 Ill. App. 3d 965, 967 (1st Dist. 2002). *De novo* review applies, however, to aspects of the appeal that present questions of law. *Mohanty v. St. John*

Heart Clinic, S.C., 225 Ill. 2d 52, 63 (2006) (legal validity of restrictive covenant); *Magee v. Huppin-Fleck*, 279 Ill. App. 3d 81, 85 (1st Dist. 1996) (statutory construction). Thus, in reviewing an interlocutory injunction granted to the plaintiff, the Court must consider whether the complaint states a legally valid cause of action. *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1062-64 (1st Dist. 2000) (surveying cases).

II. Because Plaintiffs' Action Is Barred by Sovereign Immunity, the Circuit Court Lacked Jurisdiction and Therefore Lacked Authority to Enter the TRO.

The circuit court erred in entering the TRO because that court lacked subject matter jurisdiction over Plaintiffs' claims. Such jurisdiction was a threshold requirement for the circuit court to proceed in the case. *In re M.W.*, 232 Ill. 2d 408, 414 (2009) ("If a court lacks . . . subject matter jurisdiction . . . any order entered in the matter is void"). For that reason alone the TRO must be reversed.

The circuit court's ruling that Plaintiffs' claim is not barred by sovereign immunity is contrary to express statutory language. The State Lawsuit Immunity Act states in relevant part that, except as provided in the Court of Claims Act, "the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2014). The Court of Claims Act provides that the Court of Claims has "*exclusive jurisdiction*" over:

> (a) All claims against the State *founded upon any law of the State* of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; . . .
> (b) All claims against the State *founded upon any contract* entered into with the State of Illinois.

705 ILCS 505/8 (2014) (emphasis added). Here, the single count in Plaintiffs' Complaint expressly relies on their allegation that they have a "contract" with the State, and they seek an injunction to enforce its terms. (S.R. 17, ¶¶ 45-50.) Having made that "contract" an essential element of their claim, Plaintiffs cannot avoid the conclusion that this claim is "*founded upon* [a] contract entered into with the State of Illinois," and therefore within the "*exclusive jurisdiction*" of the Court of Claims. 705 ILCS 505/8(b) (2014) (emphasis added).

The circuit court's holding also is in conflict with controlling precedent. In *State Building Venture v. O'Donnell*, 239 Ill.2d 151 (2010), for example, the plaintiff brought a declaratory judgment action seeking a determination of its rights under a lease with the State, claiming that the State's construction of certain provisions was invalid and that it was damaged by that construction. *Id.* at 155-56. The Court held that sovereign immunity barred the action because it was founded upon a contract with the State, even though only declaratory relief was sought, because plaintiff presented a present claim for relief by seeking a determination of its rights under the contract. *Id.* at 164-65. Plaintiffs here, by asking the circuit court to determine employees' rights under alleged contracts with the State and to order the State to make payments under the terms of those contracts for services rendered, clearly have brought a claim founded upon a contract with the State. Sovereign immunity bars this action, and it was therefore beyond the circuit court's jurisdiction. Moreover, the attempt to waive sovereign immunity by the attorneys who purported to represent the Comptroller was not only improper, but ineffective, because only the legislature can do so. *Brucato v. Edgar*, 128 Ill. App. 3d 260, 266-67 (1st Dist. 1984).[6]

The circuit court erred as a matter of law in finding merit to Plaintiffs' attempt to avoid the jurisdictional effect of Section 8(b) of the Court of Claims Act by alleging that Defendants' failure to pay what Plaintiffs say is contractually due constitutes an unconstitutional "impairment" of those contracts. And even if the lack of enacted appropriations statues were an impairment of Plaintiffs' contract rights (which it is not), that claim for monetary relief and the requested remedy of payment of funds from the State treasury still would be "founded upon" a contract with the

[6]Plaintiffs cannot avoid sovereign immunity for a claim seeking payment of public funds to comply with a contract simply by asking for injunctive relief. See *Ellis v. Board of Governors of State Colleges & Univs.*, 102 Ill. 2d 387, 395 (1984); see also *State Bldg. Venture*, 239 Ill. 2d at 164. This is not a case involving a claim that a statute is unconstitutional nor is it a case involving a state official whom plaintiffs claim is attempting to act "in excess of his delegated authority," thereby engaging in an *ultra vires* act. *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 266-68 (2005) (quoting *Ellis*, 102 Ill. 2d at 395, emphasis omitted); see also *Ellis*, 102 Ill. 2d at 395. Sovereign immunity's application in those contexts is not at issue here.

State, in addition to being "founded upon [a] law of the State," both of which put the claim squarely within the Court of Claims' exclusive jurisdiction. 705 ILCS 505/8(a), 8(b) (2014). *See, e.g., Boards of Ed. of School Districts 67, etc. v. Cronin*, 54 Ill. App. 3d 584, 587 (1st Dist. 1977) (holding that circuit court lacked jurisdiction because "it lacks authority to enter a monetary judgment against the State" based on a "claim for monetary reimbursement . . . founded upon The School Code"); *Scoa Industries, Inc. v. Howlett*, 33 Ill. App. 3d 90, 94-95 (1st Dist. 1975) ("the instant suit in effect is against the State for the recovery of a monetary judgment payable out of State funds").

III. The TRO Was Legally Improper.

A. Standards Governing Issuance of a TRO.

"A temporary restraining order is a drastic remedy which may issue only in exceptional circumstances and for a brief duration." *AFSCME v. Ryan*, 332 Ill. App. 3d at 966. To justify entry of a TRO, the movant must establish (1) a clearly ascertainable right in need of protection; (2) irreparable harm without protection; (3) no adequate remedy at law; (4) a likelihood of success on the merits; and (5) that the balance of equities favors granting the TRO. *Kanter & Eisenberg v. Madison Assoc.*, 116 Ill. 2d 506, 510-11 (1987).

B. Plaintiffs Failed as a Matter of Law to Establish a Likelihood of Success on the Merits.

Plaintiffs failed to establish a likelihood of success on the merits of their claim for two reasons. *First*, as already explained, because the circuit court lacked jurisdiction over the claim, Plaintiffs could not succeed on it. *Second*, there is no merit to Plaintiffs' theory that the Contracts Clause applies to nonperformance of a contract due to the lack of enacted appropriations legislation. Because Plaintiffs' claim under the Contracts Clause is unfounded as a matter of law, the TRO must be reversed.

The Contracts Clause of the Illinois Constitution provides that "*No . . . law* impairing the obligation of contracts . . . *shall be passed.*" Ill. Const. art. I, § 16 (emphasis added). Its text follows its counterpart in the U.S. Constitution (U.S. Const. art I, § 10: "*No State shall . . . pass any . . . Law*

impairing the Obligation of Contracts") (emphasis added), and is "interpreted in the same fashion," *George D. Hardin, Inc. v. Village of Mt. Prospect*, 99 Ill. 2d 96, 103 (1983). The purpose of the Contracts Clause "is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 398 Ill. App. 3d 510, 530 (2d Dist. 2009) (citation and internal quotation marks omitted). That purpose is not implicated in this case.

Plaintiffs' claim fails because it does not challenge the *passage* of any law. To the contrary, they complain about the *absence* of legislation. Given the language of the federal and Illinois provisions referring to a law being *passed*, it is not surprising that both the United States Supreme Court and our Supreme Court have strictly limited the Contracts Clause's reach to that circumstance. *Cleveland & P.R. Co. v. City of Cleveland*, 235 U.S. 50, 53-54 (1914) (holding that a judicial decision cannot violate the Contracts Clause, and stating, "[i]t is . . . well settled that an impairment of the obligation of the contract, within the meaning of the Federal Constitution, *must be by subsequent legislation*") (emphasis added); *People v. Ottman*, 353 Ill. 427, 430 (1933) ("The constitutional provision denying the power to pass any law impairing the obligation of a contract has reference only to a *statute* enacted after the making of a contract.") (emphasis added).

Plaintiffs complain of the *failure* to enact legislation. (Compl. at ¶¶ 27-28, 35-36). Thus, Plaintiffs' authority is inapposite because those cases involved impairment claims based on legislative action, not inaction. See *Univ. of Hawaii Prof'l Ass'n v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991); *Opinion of the Justices (Furlough)*, 609 A.2d 1204 (N.H. 1992); *Carlstrom v. Washington*, 694 P.2d 1 (Wash. 1985).

Plaintiffs are improperly attempting to characterize what is, at best, a claim for breach of contract as a constitutional violation. And they attempt this novel theory because *Netsch*, in almost identical circumstances, held that the Appropriations Clause prohibited the Comptroller from paying state employee salaries absent an enacted legislative appropriation. Plaintiffs' attempt fails

in light of clear precedent recognizing the basic "distinction between a breach of contract and a law impairing the obligation of a contract." *Thompson v. Auditor General*, 261 Mich. 624, 633, 247 N.W. 360 (1933). "If a valid contract is made and entered into, and one party thereto refuses to perform it, such refusal amounts to a breach of contract. An action may lie to enforce it. Its validity is not impaired." *Id.* A breach occurs when a state legislature exercises its power "to refuse to perform," including "where it forbids the application of money in the state treasury," even if at the same time it maintains the privilege of sovereign immunity. *Id.* at 635 (citation omitted). See also *Hays v. Port of Seattle*, 251 U.S. 233, 237-38 (1920); *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 404-05 (1982) (holding that sovereign immunity does not affect the validity of a contract or the State's legal liability). Thus, the law is clear that a Contracts Clause violation does not arise from a government body's failure to perform its contractual obligations, for it "would be absurd to turn every breach of contract by a state or municipality into a violation" of the constitution. *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996); see also *Council 31, AFSCME v. Quinn*, 680 F.3d 875, 885-86 (7th Cir. 2012).

C. The Circuit Court Misapplied the Other Factors Relevant to Plaintiffs' Motion for a TRO.

The circuit court also abused its discretion as to the other factors relating to Plaintiffs' motion. First, Plaintiffs failed to establish an inadequate remedy at law. The damages Plaintiffs said their members would incur from an alleged failure to pay them can be precisely determined. And where a party can be made whole by an award of damages, there is an adequate remedy at law. See *Charles P. Young Co. v. Leuser*, 137 Ill. App. 3d 1044, 1051 (1st Dist. 1985). Second, in balancing the equities, the circuit court simply ignored the irreparable harm to the State that would result from an unlawful expenditure of public funds. See *Granberg v. Didrickson*, 279 Ill. App. 3d 886, 889 (1996) (citing, inter alia, *Snow v. Dixon*, 66 Ill. 2d 443, 450-55 (1977)).

IV. The Circuit Court Committed Reversible Error by Allowing the Comptroller to Be Represented in Her Official Capacity by Her Own Attorneys.

The Comptroller was properly represented in this action by the Attorney General. Over the Attorney General's objections, however, the circuit court not only let the Comptroller's general counsel and other attorneys appear on her behalf at the TRO hearing, but, having decided to dismiss the State from the case, the court effectively allowed the Comptroller to make binding concessions on critical issues, including whether Plaintiffs' claim is barred by sovereign immunity, whether their Complaint states a legally valid cause of action, whether any injunctive relief was warranted, and the scope of relief. (S.R. 160-162.) This prejudicial error infected the TRO, which therefore must be reversed.

Supreme Court precedent is absolutely clear that, as a matter of Illinois constitutional law, the Attorney General has the *exclusive* power to represent the State, its agencies and officials in litigation when the State is the real party in interest.[8] *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 509-16 (2005); *Lyons v. Ryan*, 201 Ill. 2d 529, 535-40 (2002). In these cases, the Attorney General is responsible for "serving . . . the broader interests of the State," rather than the particular interests of individual agencies or officers, and the Attorney General is not subject to the conflict of interest rules governing private attorneys. *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 401-402 (1977). Giving those agencies or officials the power to retain their own lawyers and control their own representation, the Supreme Court has warned, would "invite chaos into the area of legal representation of the State." *Id.* at 402.

Nonetheless, the circuit court allowed the Comptroller to be represented by her unauthorized attorneys, who advocated positions that were unrelated to the proper exercise of her official

[8] There is no question that the State is the real party in interest here. For cases involving state officers, the State is the real party in interest when the state officer is sued in his or her official capacity (and not for wrongful acts outside the official's authority), or the plaintiff seeks relief that would operate to control the actions of state government itself. See, e.g., *Posinski v. The Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 376 Ill. 346, 351 (1941) ("where the rights of the State are directly and adversely affected by the judgment or decree sought against the officer of the State, the suit is against the State"). Here, Plaintiffs sought to require the Comptroller, in her official capacity, to make payments from the State treasury.

functions and promoted the interests of other parties, as if the Comptroller, not the Attorney General, had somehow been vested with the "responsibl[ity] for representing the broader interests of the State." *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 483 (1992).

The result was the Comptroller attempted to waive sovereign immunity and confess judgment on behalf of the State, in apparent concert with Plaintiffs, and even urged the court to extend the scope of the temporary injunction to *all* state employees, relief well beyond Plaintiffs' request. That was reversible error.

V. The Circuit Court Improperly Interfered with the Jurisdiction of the Appellate Court and Circuit Court of Cook County Over the Same Subject Matter.

The circuit court also abused its discretion by entering the TRO despite the parallel court proceedings in Cook County involving the same subject matter — *i.e.*, what state employee payroll the Comptroller may legally process without a legislative appropriation. To promote the orderly administration of justice, a court may not interfere with the jurisdiction of a court of concurrent jurisdiction by entering an order requiring a party to take action that would conflict with the other court's order that has not been reversed on appeal. *People ex rel. E. Side Levee & Sanitary Dist. v. Madison Cnty. Levee & Sanitary Dist.*, 54 Ill. 2d 442, 445 (1973); *In re Marriage of Baltzer*, 150 Ill. App. 3d 890, 895 (2d Dist. 1986). In that situation, the second court's "acceptance of jurisdiction and issuance of orders conflicting" with those of the first court is "clearly erroneous" and "can only serve to diminish public respect for the judicial system of this State." *People ex rel. E. Side Levee & Sanitary Dist.*, 54 Ill. 2d at 445; see also *Alfaro v. Meagher*, 27 Ill. App. 3d 292, 297-99 (1st Dist. 1975); *Pepin v. City of Chicago*, 79 Ill. App. 2d 295, 298-300 (1st Dist. 1967). That principle has particular force where the relief sought in the second case would be tantamount to dissolving the first court's injunction — especially when that relief is being sought on appeal in the first case, so the second court's granting the relief sought would interfere with the jurisdiction of the appellate court. *Pepin*, 79 Ill. App. 2d at 298-99; see also *In re Marriage of Price*, 2013 IL App (4th) 120422, ¶ 11.

Those principles — which the circuit court disregarded over the State's objection — apply here. Plaintiff unions in this case were granted leave to intervene in the Cook County case and made the same Contracts Clause argument asserted here. Only after they failed to prevail in the Cook County proceeding did they seek a TRO in this case that would directly conflict with the Cook County court's order by *requiring* what that order *prohibits*. And they proceeded with their request for a TRO in this case despite an interim appellate order staying the TRO but denying the affirmative relief sought for all state employees here. In these circumstances, the circuit court's decisions to entertain Plaintiffs' motion and then grant it not only interfered with the parallel proceedings in Cook County (including in the appellate court), but clearly served to "diminish public respect for the judicial system of this State." *People ex rel. E. Side Levee & Sanitary Dist.*, 54 Ill. 2d at 445; see also *Alfaro*, 27 Ill. App. 3d at 297-98 ("If the structure of our court system permitted loose practice, such as collateral review by one branch of the circuit court of orders previously entered in another, the result would inevitably be complete chaos.") For this reason, too, the TRO should be reversed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the temporary restraining order dated July 10, 2015 be reversed.

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Certificate of Filing and Service

The undersigned, an attorney, certifies that on July 13, 2015, he caused the foregoing People's Memorandum in Support of Rule 307(d) Petition for Review of Temporary Restraining Order to be filed with the Clerk of the Appellate Court of Illinois, Fifth Judicial District, and one electronic copy and three hard copies to be served, respectively, by personal service, e-mail and by postage-prepaid first class mail to:

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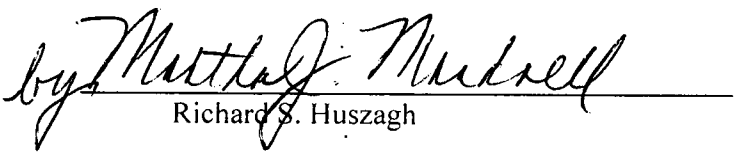

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The undersigned, an attorney, certifies that on July 14, 2015, he caused the foregoing Supplemental Supporting Record to be submitted electronically to the Clerk of the Supreme Court of Illinois, and one electronic copy and one hard copy to be served, respectively, by e-mail and by postage-prepaid first class mail to:

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